

Application No. 10/645,758  
Amendment dated June 22, 2007  
Response to Office Action of March 23, 2007

### **REMARKS/ARGUMENTS**

Claims 6 and 8-23 are pending in this application. Claims 6 and 8-23 presently stand rejected under 35 U.S.C. §103(a). Based on the following remarks, Applicants respectfully request reconsideration and allowance of claims based on this Response, and withdrawal of all rejections.

#### **Claim Rejections Under 35 U.S.C. §103(a)**

Claims 6, 10-13, 16-17 and 20-23 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent 4,629,628 issued to Negro (hereinafter "Negro") in view of the combination of Technology of Biscuits, Crackers and Cookies (hereinafter "Technology Reference"), and of Dictionary of Food Ingredients (hereinafter "Dictionary"). Claims 8-9, 14-15, and 18-19 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Negro in view of the above stated references and further in view of Japanese Patent No. JP 05-316930 issued to Eiji Ito et al. (hereinafter "Ito"). Claims 6 and 8-23 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Negro in view of the Technology Reference, the Dictionary, and U.S. Patent 5,955,123 issued to Daggy (hereinafter "Daggy"). Applicants respectfully traverse these rejections because there are no motivations to combine these references.

#### **I. Rejection of Claims 6, 10-13, 16-17 and 20-23**

Independent Claim 6 is directed to a confectionary product that includes two outer wafer layers. The wafer layers are formed from a batter having specific components and ranges of components which are effective for providing a confectionary product that remains crunchy even upon continued chewing. The combination of cited references do not teach one of ordinary skill which components to select and what amounts of each components to use to provide a confectionary product that remains crunchy upon continued chewing.

As previously discussed in Applicants' Office Action response dated January 10, 2007, and acknowledged by Examiner on page 4 to be true (by citing the corrected ranges), Negro does not disclose the same amounts of cocoa, lecithin or salt in the batter recipes disclosed therein. For example, Negro discloses lecithin (i.e., less than 0.16%) in amounts less than Applicants' amounts. Furthermore, the Dictionary reference defines lecithin as an emulsifier that has many uses, and even when mixed with cocoa powder it may have many uses (i.e., controlling flow properties of cocoa powder or used as a wetting agent, just to name a few). A large usage range may be given in the Dictionary reference, however, this range is large to encompass all of the many different uses of lecithin. It is understood that only as much lecithin as is needed to impart the necessary effect is used, and not that the entire range cited is appropriate for each use specified.

The Technology Reference, which actually teaches lecithin in an amount of 0.38% in Recipe 4 (i.e.,  $0.95\text{g}/250\text{g} \times 100 = 0.38\%$ , if rounding it would be rounded up to 0.4% and not rounded down), states a lecithin amount which is still outside Applicants' range of 0.2 to 0.3%. Furthermore, Recipe 4 has a different composition than Applicants' wafers (as do the remaining recipes shown in the Table), and the only two examples that use lecithin do not even contain cocoa powder; therefore it is obvious that the purpose of lecithin use is different from Applicants' use with cocoa powder. Also the last sentence of the first paragraph on page 294 of the Technology Reference states that the recipes given in Table 29.1 (which is the Table containing Recipe 4) show "a limited range of both types and quantities of ingredients in common use." Thus, implying that the range shown in the table is limited to what is shown and further broadening (i.e., lowering) of that range is not taught. There is no specific suggestion provided by any of these references that would lead one to Applicants' lecithin range when applied to a wafer batter containing cocoa.

As further discussed in the 1/10/07 response, and acknowledged by the

Examiner (at page 5), the cocoa amount given in Negro (i.e., 1.5%) is less than the amount in Applicants' invention. The Dictionary reference discusses using cocoa to impart color and flavor only (page 37); there is no mention of it also being used to impart a crunchy texture. The Technology reference mentions adding cocoa for flavor reasons as well in a ratio of 750 g of cocoa per 100 kg of flour, an amount that is significantly less than the amount used in Applicants' invention. (This translates to a ratio of 1:133 cocoa to flour, whereas Applicants use a ratio of approx. 1:3.5 to 1:20). Therefore, no combination of these references would teach increasing the cocoa amount in a wafer to impart a crunchy texture, especially where all the references teach using cocoa for flavor and coloring purposes at significantly lower amounts. For these purposes just a slight amount of cocoa would be needed to impart a flavor or coloring that is desired, it would not be obvious nor necessary to increase the cocoa amount since a smaller amount is adequate (and less expensive).

Independent claim 12 is directed to a method of producing a wafer that is effective for producing a batter with certain viscosity range. The Examiner states that the Applicants have chosen a parameter, i.e. viscosity, that the office cannot measure for the purpose of prior art comparison (see Office Action page 11). Applicants have not chosen this parameter as a way to distinguish Applicants' invention over Negro or other references just because the Patent Office cannot measure it. However, because viscosity is not mentioned in Negro does not mean it can be inherently assumed to be the same for all wafers. Viscosity, not being a parameter indicated anywhere in the Negro reference, cannot be made up by the Examiner for purposes of comparing references. **Just because the Patent Office cannot physically measure the viscosity of the Negro batter, does not mean that it can then simply assume it to be equal to Applicants' viscosity.** Nor can two products having a similar thickness after baking be assumed to have had the same viscosity batter upon preparation prior to baking, since many different parameters can affect a baked product (such as oven

settings, for example).

It is well known in the art that two batters of identical viscosity can be formed into different thickness wafers. Likewise, the opposite is also true; that similar thickness wafers can have different viscosities since there are many factors that can contribute to a wafer thickness. Negro even states at column 1, lines 38-46, that "to make the wafer thicker ... it is necessary to increase the surface area of the product to be baked" by baking the wafer in a "wafer mould with indentations." There is no mention of having to achieve a certain viscosity value similar to Applicants' in order to obtain a desired thickness, or that viscosity is the sole factor affecting thickness, thus offering further support that there are many factors that affect a wafer's thickness.

There is no scientific data that Applicants know of that says that wafers (or food products in general) having the same thickness also must have had the same viscosity when prepared from a batter. Furthermore, the Technology reference states, at page 298, that there is no clear correlation between batter viscosity from any particular recipe and wafer sheet weight, which can also be further extrapolated to other physical properties, like thickness.

Thus, Applicants respectfully submit that independent claims 6, 12, and 16 are allowable, as discussed above, and that dependent claims 10-11, 13, 17, and 20-23, that depend therefrom, are also not obvious for the same reasons and reconsideration and allowance of these claims is hereby requested.

## **II. Rejection of Claims 8-9, 14-15, and 18-19**

Ito discloses a shell used for filling with ice cream or other frozen desserts where the shell contains cocoa powder to add flavor and color and also allegedly to aid in low moisture absorption. However, due to the shell being stored in a frozen state at a low temperature, the low moisture absorption within the shell of Ito is most likely due to the temperature at which the shell is stored, and not due to the cocoa powder amount.

For example, the filled shell of Ito is almost always in a frozen state which means the ice cream or frozen dessert filling is also in a frozen state, thus having little moisture present for migration into the shell. The frozen state of the shell and filling plays a large part in why the shell absorbs little moisture and remains crunchy, since there is little moisture in a frozen environment to begin with. It would not be obvious to an ordinary person skilled in the art to identify the cocoa amount as the primary reason for low moisture absorption, since the shell is stored in a frozen state, which aids in preventing migration of moisture and humidity in the surroundings of the shell. The different use/storage of Ito makes it different from the way Applicants' wafer and Negro's wafers are stored and used. The filling shell is stored in a frozen state until use and filled with an ice cream or frozen dessert, whereas Applicants' wafer is normally stored at about room temperature. There are many food products that exist that also contain cocoa powder and may even use cocoa powder in Applicants' range, however, that does not make them obvious to try with a wafer product, especially when the product is used/stored in a different state, as with Ito's shell.

Furthermore, Applicants' wafer deals with wafer-based confectionary products comprising at least two outer wafer layers and an inner filling layer. Ito's shell composition is an outer shell having only one layer for holding ice cream; the shell is not a wafer composition of at least two outer layers as defined by Applicants' invention nor does it comprise the same ingredients, therefore it would not have been obvious to combine it with a wafer of Negro (which also requires a wafer product of at least two or more wafer sheets, see claim 1 of Negro).

Additionally, the Ito reference contains 10-60 parts cocoa plus emulsifier per 100 parts powder having starch powder, such as wheat flour, as the primary component. However, this information does not tell us anything about the specific cocoa amount or the specific emulsifier amount that is to be used. Lecithin is identified as a possible emulsifier, however a lecithin amount is not specifically identified, thus it would not be obvious to obtain Applicants' lecithin amount from the Ito reference. In reading the Ito

reference, a person of ordinary skill in the art would have no idea how much cocoa or how much emulsifier (i.e., lecithin) to use from the disclosure; rather it is the total amount of **both** together that is disclosed. A lecithin amount, as discussed in Ito and above in section I, is not recited anywhere in Applicants' range, nor does combining the Ito reference with the other references correct for this deficiency.

Similarly, a cocoa amount is not recited in Ito in Applicants' range. Although an example in Ito shows adding about 7.6% cocoa to a shell batch, this addition is to a shell recipe which contains various other ingredients such as at least two emulsifiers (sucrose and glycerin) that are not used in Applicants' wafer recipe. The cocoa amount of 7.6% is not disclosed with lecithin but rather with two other emulsifiers, which is most likely why a larger amount of cocoa is needed. Thus there is no obvious reason why a person of ordinary skill in the art would have combined the references in the claimed manner.

Applicants' invention discloses applying 2-10% cocoa powder to a wafer batter recipe for purposes other than adding flavor or color, where prior amounts of cocoa in wafer batters were low because it was used only for purposes of flavoring ever so slightly or adding slight color. Other unrelated food products also use cocoa powder for the purpose of enhancing flavor or coloring. These amounts may be larger than used in wafers because of the different food products having different characteristics and ingredients that require larger amounts of cocoa to obtain a desired flavor level or color, such as is with the shell recipe of Ito.

Furthermore, the Dictionary Reference and Technology of Biscuits both teach cocoa for flavor and color. Wafers are small and have small volumes so they do not require much cocoa powder to flavor or color it. Negro even states that to adjust the flavor and color of a wafer product that this is accomplished by adding preferably 1.5% cocoa (Col. 3, lines 53-55).

Just because these other food products use larger amounts of cocoa powder, it

would not be obvious to apply those larger amounts of cocoa powder to a wafer product that already potentially achieves its desired flavor and color targets with a smaller amount. Adding more cocoa would be wasteful and increases the cost of manufacture when no additional benefit had been identified. Furthermore, the amount of cocoa used in the other recipes in the references cannot be viewed in isolation, but rather must be viewed in relation to the other ingredients and the use of the final product to determine if the increased amount of cocoa is because of other factors, factors that would not apply to a wafer batter and product. In Ito, two different emulsifiers are used in an example where neither is lecithin, which can be the reason requiring more cocoa addition. This particular makeup (having two emulsifiers) is a factor that is not present in Applicants' wafer recipe and thus it would not be obvious to increase the cocoa if the same situation is not also present.

As stated, since the known objectives of flavoring and coloring wafers was achieved with low amounts of cocoa powder, there was no reason to increase the cocoa powder amounts to higher levels used to also flavor and color other food products that had different requirements that may warrant the higher cocoa amounts.

Therefore, for at least these reasons, Applicants respectfully submit that Negro in view of Technology of Biscuits, Crackers and Cookies, in view of Dictionary of Food Ingredients, and further in view of Ito do not disclose or suggest the invention claimed in claims 8-9, 14-15, and 18-19 and that it is not obvious to combine Ito or any of the two above given references with Negro to obtain Applicants' cocoa range and properties. Moreover, claims 8-9, 14-15, and 18-19 are not obvious and reconsideration and allowance of these claims is hereby requested.

### **III. Rejection of Claims 6, 8-23**

The Daggy reference regulates bowel functions by adding Metamucil®, which contains psyllium, to baked goods. The combination of the Daggy reference with the

three references previously discussed above at section I, does not add anything. Please refer to the arguments above at section I pertaining to the ingredients and the amounts of cocoa and lecithin in regards to the three references Negro, Technology, and Dictionary.

Even though the Daggy reference may teach addition of flavoring agents to baked goods in the amounts of 0-30% (where cocoa is listed as a possible flavoring agent), it is teaching addition of flavoring agents to psyllium based baked goods. The flavoring agents are needed to mask the additional ingredient of psyllium and to provide a pleasant taste despite an increased psyllium content. Therefore, the purpose for addition of such a high amount of cocoa is to add flavor and to mask another component, rather than for purposes of adding crunchiness to the product. There is no obvious reason that a person of ordinary skill in the art would take the art taught in Daggy, to add increasing amounts of a flavoring agent to mask the taste of increased psyllium ingredient in a baked good, with the references referring to wafers to come up with Applicants' invention. The large amount of flavoring agent is used to mask the large amounts of psyllium; if a wafer does not contain psyllium then there is no motivation to increase the cocoa amount in the wafer to the levels disclosed in Daggy since there is no psyllium taste to mask.

A similar argument is made in regards to the lecithin amount disclosed in Daggy. The large range of 0.1-30% is given to coincide with the large amount of psyllium added, where the amount of lecithin is adjusted according to how much psyllium is added. Emulsifiers are used to control the consistency of the dough (Col. 5, lines 8-10) and one would imagine that when adding a product like psyllium to a dough batter that it has a tendency to form a gelatinous mass (see Col. 1, lines 23-24) and that the more psyllium added, the more emulsifier is needed to compensate for this. Therefore, there is no rational reason that increased lecithin amounts due to addition of psyllium would make it obvious to a person of ordinary skill in the art to increase lecithin in a wafer that



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does not similarly have the problem of gelatinous masses forming. Furthermore, as stated in section I, the Technology reference discloses lecithin in an amount of 0.4% (i.e., 0.38% properly rounded), not 0.3% as Examiner states on page 6.

Thus, Applicants respectfully submit that independent claims 6, 12, and 16 are allowable, as discussed above, and that dependent claims 8-11, 13-15, and 17-23 that depend therefrom respectively, are also not obvious for the same reasons and reconsideration and allowance of these claims is hereby requested.

#### **CONCLUSION**

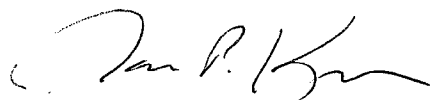
In view of the foregoing, Applicants submit that claims 6 and 8-23 are patentable over the cited references and hereby respectfully request reconsideration and allowance of claims 6 and 8-23. The Commissioner is hereby authorized to charge any additional fees which may be required in this matter, or to credit any overpayment, to Deposit Account No. 06-1135.

Respectfully submitted,

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